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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1966

NO. 250

LLOYD ELDON MILLER, JR.,

Petitioner,

vs.

FRANK J. PATE, WARDEN,

Respondent.

(On Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit)

BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

It is the contention of the Respondent that no error of constitutional proportions occurred at Petitioner's trial in the State courts of Illinois. In this *habeas corpus* action the District Court found against Petitioner on all factual issues here presented. It is contended that this determination is not clearly erroneous and must, therefore, prevail on appeal.

In particular, it is the Respondent's position that no contention on which the Petitioner predicates a violation of his constitutional rights is valid for the following reasons:

1) **Nondisclosure of the hair.**

There is no duty upon the prosecution to reveal that a hair found in the vagina of the victim of a sex killing was not that of the accused where there is no evidence of how or when that hair came to be there and where the accused knew a hair was discovered there and made no attempt to have the results of any test made upon it be made of record at his trial.

2) **Nondisclosure of Paint on the "Bloody" Shorts.**

No constitutional deprivation of rights occurred when the prosecution introduced evidence that blood was found on a pair of shorts allegedly those of the accused when the shorts were stained with paint where the evidence shows that blood was on the shorts as well as the paint.

3) **Denial of the Motion for Examination of the Scientific Evidence In the Possession of the Prosecution.**

Under Illinois law the right of an accused to examine all scientific evidence in the hands of the State lies in the sound discretion of the court, and the denial of such a motion is not a constitutional violation at least where the necessary steps to have the exercise of this discretion reviewed by the Illinois Supreme Court were not taken by the accused.

4) **Statements Made to the Witnesses.**

A statement made to prospective witnesses that they had a "constitutional right" not to talk to the accused's

attorney prior to trial is not a constitutional violation where the statement is legally accurate.

5) The "Untrustworthy" Witness And Her Uncorrected False Statement.

The prosecution may call a witness whose testimony they believe although they have not believed statements she made on past occasions, and no duty rests upon them to reveal those past occasions.

If a witness makes a statement which is not material (here that she had known petitioner for two years when she had only known him eleven months), it need not be corrected by the prosecution where, although an earlier statement to the prosecution had shown the proper facts, there is no evidence the fact of the discrepancy was realized by the prosecution at the trial.

6) The Validity Of The Confession.

A false statement made by the prosecution during a period of interrogation which culminates in a confession does not invalidate the confession especially where there is no evidence the prosecution knew the statement was false when it was made, and the accused placed no reliance on the statement as evidenced by his immediate denial of its truth.

Incommunicado detention alone, without evidence of its use in a coercive manner, does not invalidate a confession under *Haynes* v. *Washington,* 373 U.S. 503. Whether petitioner was held incommunicado and its effect in the case was not raised below and can not properly be considered here.

ARGUMENT.

I.

THE SCOPE OF THE DISCLOSURE OF INFORMATION IN THE POSSESSION OF THE PROSECUTION VIOLATED NO CONSTITUTIONAL PROTECTION OF THE PETITIONER.

A major theme of the Petitioner's brief is that his constitutional rights were violated because information in the possession of the prosecution was not made known to him and his counsel prior to trial, and was not presented to the jury at trial. He contends his constitutional rights were violated because the trial court refused to allow him to conduct an examination of the scientific evidence in the prosecution's possession, because the prosecution "obstructed" his right to interview witnesses; because he was not informed that a hair found during the examination of the victim was not his; because he (and the jury) were not informed that there was paint on the "bloody" shorts introduced into evidence; and because an "untrustworthy" witness was called by the prosecution and the unreliability of the witness was not revealed. He further contends within this area that the failure of the prosecution to correct an obviously untrue statement of the "untrustworthy" witness was an error of constitutional proportions.

These contentions raise the general issue of the duty of a prosecutor to divulge information obtained in the course of a criminal investigation to a person accused of that crime. The scope of pre-trial discovery in a criminal case is presently, under the new Federal Rules of Criminal Procedure and the criminal procedural codes of

most states, much more limited than discovery in a civil case. This is often supported on the basis that because of the Fifth Amendment privilege against self-incrimination, criminal discovery would not operate reciprocally as does civil discovery but would give the right to an accused to discover the prosecution's evidence with no concommitant right of the prosecution to discover the evidence obtained by the defense. (It is to be noted, however, that Rule 16 (c) of the Federal Rules of Criminal Procedure provides that the court *may* allow the Government to discover the defense's evidence to the same degree the defense can discover the Government's if the defense first moves for discovery.)

It is believed that because the proper end of a criminal trial is to attain justice the pendulum is properly moving toward a broader scope of discovery in criminal trials. Illinois is not in the background in this movement. The Illinois Criminal Code provides that an accused may obtain from the prosecution a list of all prosecution witnesses and their addresses and, if a confession is involved a copy of it, if written, and a list of the witnesses present when it was made. (Ill. Rev. Stat. 1965, ch. 38, §§ 114-9, 114-10.) Furthermore, by judicial decision, it has been held that after a prosecution witness has testified on direct, the prosecution is required to turn over to the accused any statements they received from them relating to the subject of his testimony, (*People* v. *Wolff*, 19 Ill. 2d 318; 167 N.E. 2d 197 (1960), *cert.* denied 364 U.S. 874), and that in this discretion of the court on a proper showing of necessity an accused may examine the physical evidence in the hands of the prosecution (*People* v. *Miller*, 13 Ill. 2d 84, 184 N.E. 2d 455 (1958) *cert. denied*, 357 U.S. 943).

While the trend is clearly toward a greater scope of discovery in criminal cases, it is respectfully submitted that this trend should be developed in such a manner as the increased scope of discovery will be applied prospectively and not be applied so as to reverse convictions properly obtained in light of the rules in effect at the time of the trial.

This is not to say that no constitutional protections are applicable to this area. Indeed, the real issue here is whether any of these constitutional protections have been violated.

The leading decision of this Court on this question is *Brady* v. *Maryland*, 373 U.S. 83. In that case the petitioner and one Bobbit were tried for first degree murder and sentenced to death. The petitioner had asked the prosecution to allow him to examine Bobbit's extrajudicial statements and many were shown him; but one in which Bobbit admitted he had committed the actual homicide was withheld. This Court said at page 87:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution."

Similarly in *Napue* v. *Illinois*, 360 U.S. 264, the principal state witness then serving a sentence for the same murder for which the petitioner was being tried stated on the stand that he had received no promise of consideration in return for his testimony. In fact the Assistant State's Attorney had in fact promised him consideration but did nothing to correct the witness' false testimony. This Court said at p. 269:

> "It is established that a conviction obtained through use of false evidence, known to be such by representa-

> tives of the State, must fall under the Fourteenth Amendment, . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."

The question then becomes whether any of the constitutional privileges announced by those cases were violated in the petitioner's trial.

A.

The Failure of the Prosecution To Disclose a Hair Was Found in the Victim's Vagina Which Was Probably Not That of the Petitioner Was Not Improper, Nor Was The Denial of Petitioner's Motion to Examine All the Scientific Evidence in the Hands Of the Prosecution.

Petitioner's first contention is that the prosecution should have revealed that a hair found in the vagina of the victim was not his.

The report of Forrest Litterly, Assistant Supervisor of the Crime Laboratory of the Bureau of Criminal Identification and Investigation, Springfield, Illinois, a copy of which was sent to the prosecution stated as follows:

> "The small, round, clear plastic, container described as No. 6 contained two rolled Kleenex that had been used to obtain a vaginal smear from Janice May. On one of the Kleenex a hair was found. A surface cast of the hair was made and upon microscopic examination of the cast several characteristics were observed which indicated that the hair was probably of human origin. The hair was then mounted for microscopic examination and compared microscopically with mounted samples of pubic hair from Lloyd Eldon Miller Jr. (Described as No. 15) No similar characteristics between the two hair samples were

observed and it is the opinion of the examiner that the common origin of the two hair samples is not probable." (R. V, Pet. Ex. No. 6.)

Was the failure to divulge this report a violation of the holding of this Court in *Brady* v. *Maryland*? It is significant to note that that case requires that the refusal to divulge be "on request" and relates to "material" evidence.

It is contended that neither of these requirements was met in the instant case. The issue of the materiality of the hair was considered by the Court of Appeals for the Seventh Circuit and that court held:

> "We have searched the record and find that there is no evidence that the hair found on the victim was that of the perpetrator of the crime, whoever he was. The damaged condition of the girl's body when found and the necessary handling thereof by whatever doctors or others who examined it afforded an opportunity for the accidental depositing of the surface hair from the hands, arms or head of any of the examiners. How the hair got there is purely a matter of conjecture. The chemist did not find it in the dead body, but in a plastic container, bearing a notation, 'Janice May—11-26-55, Dr. R.J.H.' Obviously from the time it was found until the hair was put in a container, the body was subjected to handling by divers doctors and perhaps police officers. Even the chemist said only that it was 'probably' of human origin.
>
> "In view of these facts and the fact that these hairs were not admitted into evidence at the trial, the finding of the trial court that the report of the chemist was of no consequence is not erroneous. We believe it is correct." (R. IV p. 384.)

In so holding the Court of Appeals was affirmed on similar finding by the trial court which in its findings of fact stated as follows:

"The court finds that no evidence whatsoever was suppressed by the State's Attorney or any other person interested in the prosecution that would have tended to prove the petitioner innocent. The State did have in its possession evidence that a particle taken from the vagina of the victim was probably a human hair but was not one belonging to petitioner. That evidence was of no consequence and did not prejudice petitioner's case." (R. I p. 71.)

This finding of fact is, of course, conclusive on review unless it can be said to be clearly erroneous, both in the Seventh Circuit and this Court. *Niukkanen* v. *McAlexander,* 362 U.S. 390.

In light of the record in this case, that conclusion is not clearly erroneous. All that was known to the prosecution was that a kleenex used to take a vaginal smear from the victim contained a hair which was probably human and probably not a pubic hair of the accused. As the Court of Appeals indicated in their opinion, the damaged condition of the victim's body made it quite possible that it could have been deposited by a doctor or other person who handled the body.

While material evidence must be revealed on request, a prosecution should not be required to reveal all the facts determined by its investigation where the materiality of the evidence is, in the words of the Court of Appeals, "purely a matter of conjecture."

Furthermore petitioner knew that a hair was found in the vagina of the victim. He was given an opportunity to view it under a microscope in comparison to one of his pubic hairs and then stated that it was not his. (R. IV, 95) Thus he had the opportunity on cross-examination to inquire into the result of any test made on this hair. His

failure to do so should not result in a violation of his constitutional rights.

The second aspect of this question is whether the demand made here was adequate. In the *Brady* case the petitioner had made a specific request to examine all his codefendant's statements to the police. This request was partly granted but the critical statement was not given. Here no specific request was made for any particular evidence but only a general request to examine all the prosecution's scientific evidence. Under the existing concepts of criminal discovery, an accused has no right to examine all the prosecution's evidence, and the request, in its broadness, was quite similar to a request to examine all the evidence in the prosecution's hands.

It is significant to note that the Illinois Supreme Court did not hold that such a motion should never be granted but rather held that it lay within the discretion of the trial court and that it would, on appeal, review the exercise of that discretion for abuse. The court held, however, that since the proceedings on that motion were not preserved or incorporated into the record, there was no basis for a review of that decision. *People* v. *Miller,* 13 Ill. 2d 84 at p. 111, 184 N.E. 2d 455.

Clearly, however, an accused does not have a constitutional right to examine all the evidence or all the scientific evidence in the hands of the prosecution.

Thus it is clear that petitioner's contentions that the failure of the State to reveal the discovery of the hair violated his constitutional rights and the contention that those rights were violated by the refusal of his motion to examine the scientific evidence in the hands of the prosecution are invalid.

B.

The Failure of the Prosecution to State That There Was Paint on the "Bloody" Shorts Which Were Alleged To Belong To Petitioner Violated No Constitutional Protection.

Petitioner's next contention is that the prosecution improperly failed to reveal the presence of paint on the shorts which were allegedly his.

At the trial Litterly testified that he had examined and tested the shorts "to determine the nature of the staining material upon it," and that "this material upon the shorts is blood" of human origin type A. (R. IV, p. 168) In argument the shorts were referred to as stained with blood (R. IV, p. 367.).

In the district court the State's Attorney admitted that he knew all of the stains were not blood (R. II, p. 580) and Mr. Martin, a chemical microanalyst who testified for the petitioner testified that he examined twelve representative cloth fibers from the shorts of which ten showed traces of paint, one a trace of carbon, and one an unidentifiable substance. (R. II, pp. 631-32.)

Litterly, however, also testified in the district court that he had determined prior to trial that some of the stains were blood (R. I, p. 514) and that he made no effort to determine if there was anything on the shorts other than blood (R. 1, p. 515). Martin testified, in addition, that he had no opinion as to whether or not blood was present on the shorts at the trial and that Litterly's tests could have withdrawn the blood or that in the time elapsed the blood could have disappeared or broken down into some other chemical substance (R. II, p. 631-639.).

Thus the shorts were blood-stained and properly referred to as such. The presence of paint in addition is immaterial.

Thus like the issue of the hair, there was no misstatement at the trial concerning the shorts. There was no material evidence concealed, and, in addition, no proper request as to whether there was any substance on the shorts other than blood was even made.

Petitioner also asserts that there was a suppression of evidence in allowing Litterly to testify at the trial that the blood on the shorts was Type A when he had previously written in a report that it was "probably" A.

Litterly testified in the district court:

> "This is a matter of terminology in report writing that was being used at the laboratory at that time. It was the preference of Mr. Schaich, who was the superintendent at the time, that the reports were to be written in that manner; that it was a probable result." (R. I, p. 512.)

The Court of Appeals concluded,

> "We are satisfied by the record that there was no doubt in the mind of witness Litterly as to the type of blood which he found on the shorts and we, therefore, conclude that the prosecution did not knowingly permit Litterly 'to go beyond the truth.'" (R. IV, 386.)

Here, again, the matter in question was simply not of sufficient importance to be material.

C.

No Constitutional Right Of Petitioner Was Violated By the Statement of the Prosecution To A Prospective Witness That She Had A Constitutional Right Not To Talk To the Defense.

The contention that the prosecution "obstructed" petitioner's right to talk with prospective witnesses is based on a statement made by the State's Attorney to Alice Baxter, when she asked him what to do about repeated calls from petitioner's attorney that "perturbed" her. (R. II p. 848)

Alice Baxter owned and operated the rooming house where Miller was residing at the time of the crime. Her grandchildren Adrian and Rebecca Watters, who were then 7 and 8 respectively, were staying with her at the time. She testified at the Pardon and Parole Board Hearing that the children told her that on the date of the crime they woke Miller up at 4:00 P. M. and that at 4:30 P. M. she saw him come down stairs, and at her request he had a prescription filled for her at the drugstore (R. II, 818-820). The probable time of the killing was 4:00 P. M.

Petitioner contends that his rights were violated because the prosecution told Mrs. Baxter that she had "a constitutional right" not to speak to the defense attorneys and that therefore they could not learn what her testimony would be and consequently were afraid to call her as a witness.

The State's Attorney stated at the Pardon and Parole hearing that Mrs. Baxter stated prior to trial that she did not see Miller on the day in question until after 5:00 P. M. (R. III, 1079, 1097).

Miller's attorney, William Malmgren, had been to Mrs. Baxter's home and discussed the case with her although she did exhibit hostility at the time. He also had telephone conversations with her (R. II, 941-944). He could have called her as a witness or, if she were too hostile to risk that procedure, have her called as a court's witness.

The statement that she had a constitutional right not to talk with Malmgren was not erroneous. Absent a *subpoena* or perhaps an arrest, no one can be compelled to talk with anyone. Since Illinois criminal practice, like the federal rules, does not provide for discovery depositions, she could not be compelled to speak with Malmgren. Petitioner's observation that the implication of the statement was that she should not talk with him is simply unsupportable. To say that a person has a right not to, for example, invest in the stock market, can not be construed as a statement not to.

No constitutional right was denied petitioner in this regard.

D.

There Was No Duty On The Prosecution To Disclose That Betty Baldwin Was an "Untrustworthy" Witness Nor To Correct A Minor Misstatement She Made At Trial.

Petitioner contends that Betty Baldwin Curry should not have been called as a witness because she was "untrustworthy", and that once she was called that fact should have been revealed to the jury, and that the prosecution should have corrected a misstatement that she made.

Betty Baldwin testified at trial to the fact that petitioner admitted the perpetration of the crime to her the night of the offense and asked her to leave town with him.

Petitioner's contention that she was unreliable is based on the fact that at a prior time she gave information of a narcotics transaction which the authorities had not believed, and that she had stated that the defense had made threats and offers to bribe her.

There is, however, no constitutional prohibition against calling a witness who in the past has not always been reliable. Of course basic justice requires that the prosecution believe the facts the witness relates, but there is no evidence that she was not believed in this case even though there was an attempt to have her called as a court's witness. Her subsequent retraction of her testimony leaves open the question of which time she was telling the truth. It is true that on about two prior occasions she told the police stories which were not believed, but on this occasion she was deemed to be speaking the truth. Her testimony was corroborated by the petitioner's own confession when he stated to the police that he committed the crime he earlier told Betty Baldwin he had committed. Knowledge of the prior unreliability of a witness cannot preclude the prosecution from believing her on a subsequent occasion and having her testify in a criminal prosecution. If a witness is unreliable, the remedy is to bring this fact to the knowledge of the jury through impeachment so that they can determine her credibility on this occasion. This was done in this case.

In *Taylor* v. *United States,* 238 F. 2d 409, (9th Cir. 1956), the Court discussed the effect of an unreliable witness in these words, at page 413:

> "We know judicially that the use of informer-addicts as witnesses in the prosecution of narcotics cases is common and often necessary. The motion shows that the jury which heard the evidence in the case knew that Miss Grey was an addict and a paid

informer and there was obviously no effort to conceal from the jury the fact that she may well have had the qualities of unreliability commonly characteristic of such witnesses. According to the allegations of this motion there was no attempt on the part of Agent Perry to conceal from the jury the alleged impossibility of Miss Grey's story of purchasing the cocaine in the apartment for it was the agent who testified that Miss Grey must have passed Taylor in the foyer. Since Miss Grey went in with $30 and came back with the cocaine, whether she paid the money and got the cocaine in the foyer from Taylor who had been waiting for her there, or whether she bought it when she said she did in Stanley's apartment, was a matter for the jury to decide as was also the question whether her plainly disclosed unreliability required them to reject her story altogether.

"It is the appellant's view that when the prosecutor observed this discrepancy between the testimony of the Government agent and the testimony of the informer, he should have dismissed the case. Under the circumstances here disclosed, we think he was not required to do so and that the motion shows no misconduct on the prosecutor's part, much less any conduct which would amount to a denial of the appellant's constitutional rights."

In *United States ex rel. Rooney* v. *Ragen*, 173 F. 2d 668 (1949) *cert.* denied 337 U.S. 961, the Seventh Circuit ruled in the same manner. In that case the Court said:

"Without doubt, Davidson is a man of bad repute as to truth and veracity, as well as otherwise. The lower court characterized him as a "habitual liar," and petitioners in their brief describe him as a 'drunken, irresponsible, untrustworthy, psychopathic, flophouse bum with a criminal record.' We find no reason to disagree with this harsh description of him. However, it cannot be denied that Davidson on the night of the murder was in a position where he could have ac-

> quired facts to which he testified. According to all the testimony, he was in the Union headquarters on the night of the murder, in company with Rooney and Berry, and we suppose that no person is a liar of such huge proportions that he is incapable of sometimes telling the truth. His testimony was scrutinized by the jury and, corroborated as it was, must have been believed, and this notwithstanding the fact that a number of witnesses testified that his general reputation for truth and veracity was bad. Davidson, as the lower court pointed out, was 'certainly not the type of man that a prosecutor would pick out as a witness if he were to choose the type of man that he might use as a witness * * * yet I probably know very little more about that man than Judge Miller knew when he rendered judgment against petitioners.'" And it is axiomatic that whatever we may think of the veracity of Davidson or the weight which we might give to his testimony, if we were the triers of the facts are of little consequence. That is not the province of a reviewing court, particularly in a proceeding of the instant nature but was peculiarly within the domain of the jury."

Clearly the fact that the prosecution presents an unreliable witness whom they believe on this occasion violates no constitutional rights of the accused.

The contention that this lack of reliability should have been revealed to the defense is equally lacking in support. The prosecution when it presents a witness whose testimony it believes has no duty to reveal any fact which might have a bearing on the credibility of that witness.

The principal case cited by petitioner in support of this contention is *Powell* v. *Wiman*, 287 F. 2d 275 (5th Cir. 1961), but that case is readily distinguishable. It appears that in that case the prosecution did not reveal the fact that an accomplice who testified against the defendant had a long history of mental illness. Although the court appeared to condemn this, it also found that:

> "The evidence goes further, and shows that the State prosecuting attorney permitted Hatt to testify without correction to material facts directly contrary to the written statement which the attorney had previously taken from Hatt." (287 F. 2d p. 279.)

The court's decision was that on the basis of the totality of the circumstances there was a denial of a fair trial. The decision is fully supportable on the basis of *Napue* v. *Illinois*, 360 U.S. 268, alone. Thus there is no decision of an appellate court which supports the petitioner's contention.

A duty to reveal all information possessed by the prosecution relating to the credibility of its witnesses would greatly extend the duty to disclose beyond its present limits, and make almost complete the scope of discovery the prosecution owes a defendant.

The petitioner further contends that in allowing the statement by Betty Baldwin that she had known him for two years to go unchallenged was a violation of his rights under *Napue* v. *Illinois*, 360 U.S. 264.

Here Betty Baldwin had signed a statement that she had met Miller "five weeks ago" and later testified she had known him for two years. However, her testimony at the trial was made on or about September 18, 1956, and her statement was signed November 30, 1955, thus accounting for over nine and a half months of the discrepancy. Thus when she said she had known him for two years, the actual time according to her earlier statement would be about eleven months. The prosecution probably did not realize there was any discrepancy here at all since whether she had known Miller one or two years is immaterial.

Prior to *Napue* for known perjury to be grounds for reversal, the question involved had to relate to the ques-

tion of the guilt or innocence of the defendant. In *Napue* this was extended to questions which directly related to the credibility of witnesses. Here the Court is asked to extend this concept to a question which was merely preliminary and bears no relation to the guilt or innocence of Miller, nor to the credibility of the witness. Such an extension of this concept is totally unwarranted. The question of whether the witness knew Miller for approximately one or two years is totally irrelevant.

The Court of Appeals went further and ruled that there was no necessary contradiction here at all. The Court stated at 342 F. 2d 649:

> "One may know a person long prior to the time that they meet. 'Knowing' in ordinary language meant to be 'acquainted with'. 'To meet' a person indicates a joining together in some social or other activity temporarily or otherwise."

In any event to leave such a statement uncorrected was not a violation of any constitutional rights of the defendant.

II.

THE PETITIONER'S CONFESSION WAS NOT CONSTITUTIONALLY INFIRM.

Petitioner asserts that the admission of his confession at trial was unconstitutional because it was induced by a prosecution "lie" about the hair found in the victim's vagina being his, and because he was held in *incommunicado* detention for fifty-two hours prior to the time he confessed.

Neither of these grounds invalidates the confession. With respect to the "lie" about the hair's matching, it is to be noted that the petitioner confessed on November 30,

and Litterly's report that the hairs did not match is dated December 7 (R. V, Pet. Ex. 6). Thus when the statement was made to Miller that the hair found in the vagina and his matched, the prosecution did not have the knowledge that they did not. It is possible that the person who made the preliminary microscopic examination believed they did. It is clear, however, that this statement had no effect on the petitioner for he was allowed to look in the microscope, and he stated: "Them hairs don't match . . . Them hairs don't belong to me." (R. IV, p. 95.)

Thus there is no evidence that there was any deliberate misstatement on the part of the prosecution nor any reliance by petitioner on the misstatement that was made. It is respectfully submitted, however, that if there had been a misstatement relied on by the petitioner it would not have invalidated the confession. It is well established that a confession voluntarily made is not rendered inadmissible by the fact that a trick or similar device was practiced. In *Young* v. *United States,* 107 F. 2d 490 (5th Cir., 1939) the court said, at page 492:

> "The confession or incriminating statement must be freely and voluntarily made, but nothing else is indispensable. A witness to one of Young's statements was a federal officer disguised as a prisoner. That a deceit was thus practiced does not exclude what Young may have freely said to him."

See also *Lewis* v. *United States,* 79 F. 2d 173 (9th Cir. 1939); and 23 C.J.S. *Criminal Law* § 827 and the cases cited therein.

These authorities control the instant situation and not *Spano* v. *New York,* 360 U.S. 315 and *Leyra* v. *Denno,* 347 U.S. 556, as contended by petitioner. Those are cases of actual mental coercion where the accused's mind was overborne by the tactics of the prosecution. Thus in the *Spano* case the Court said, at page 323:

"We conclude that the petitioner's will was overborne by official pressure, fatigue, and sympathy falsely aroused, after considering all the facts in their post-indictment setting."

Similarly, in *Leyra*, this Court concluded at page 561:

"First, an already physically and emotionally exhausted subject's ability to resist interrogation was broken to almost trance-like submission by the use of the arts of a highly skilled psychiatrist. Then the confession petitioner began making to the psychiatrist was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution."

The confession in the instant case was not coerced and thus falls under the general rule and was admissible.

In like manner, the question of fifty-two hours of *incommunicado* detention does not invalidate the confession. Petitioner relies on coercion to invalidate the confession yet cites no coercive practices to support the contention. Rather he apparently relies on *Haynes* v. *Washington*, 373 U.S. 503, as establishing that *incommunicado* detention is itself coercion. It is contended that the *Haynes* case does not stand for this proposition. *Haynes* was not decided on the basis that *incommunicado* detention is the equivalent of coercion but rather that on the basis of the totality of the circumstances coercion was found to exist in that case. Thus this Court said at 373 U.S. p. 515:

"We are here compelled from all of the facts presented that the bounds of due process have been exceeded."

It is, of course, true that a very important factor in the "totality of the circumstances" was the *incommunicado* detention, however, the testimony in the *Haynes* case clearly showed that the *incommunicado* detention was used as a tool of coercion. There petitioner was threatened that the *incommunicado* detention would continue until he confessed and he was promised that if he would confess it would be ended. Thus this Court said at 373 U.S. p. 514:

> "The petitioner at first resisted making a written statement and gave in only after consistent denials of his requests to call his wife, and the conditioning of such outside contact upon his accession to police demands. Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment."

Thus in *Haynes* it was not mere *incommunicado* detention that vitiated the confession, but actual coercion—the threat that the *incommunicado* detention would continue until Haynes confessed.

It should first be noted it is not shown that petitioner was held in incommunicado detention in this case. The only reference to the question in the record is the Petitioner's testimony that he asked to call his parents on the 29th and 30th and was told he couldn't because they didn't want to have anything to do with him (R. IV, p. 93, 97, 100)

This evidence was never rebutted because petitioner never raised this issue in the District Court or the Court of Appeals. It, of course, should not be properly

raised here. Even if it were however, there are no facts here similar to that in *Haynes* accepting petitioner's testimony as true.

The petitioner was not threatened that he would be held *incommunicado* until he confessed, nor promised he could communicate if he did. Neither can such a threat be implied from the circumstances. He was expressly told that he could not communicate with his family because they didn't want to have anything to do with him.

Since in the instant case the *incommunicado* detention was not used as a tool of coercion as it was in *Haynes*, *Haynes* is inapplicable and petitioner shows no coercion, physical or psychological, that would invalidate his confession.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
Suite 900, 160 N. La Salle Street,
Chicago, Illinois 60601 (346-2000),
Counsel for Respondent.

RICHARD A. MICHAEL,
Assistant Attorney General of Illinois,
Of Counsel.